Local 282, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America *and* The General Contractors Association of New York, Inc. Cases 29-CB-4187-1, 29-CB-4187-2, 29-CB-4187-3, 29-CC-713, and 29-CP-417

June 30, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On November 20, 1980, Administrative Law Judge Raymond P. Green issued the attached Decision in this proceeding. Thereafter, the General Counsel, the Charging Party, and Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge only to the extent consistent herewith.

The principals in this case are Local 282, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Respondent or the Union) and the General Contractors Association of New York, Inc. (GCA). Respondent represents truckdrivers employed by employer-members of GCA in a multiemployer bargaining unit.

Another multiemployer association which also has a collective-bargaining agreement with the Union covering truckdrivers is the Building Contractors Association (BCA). Generally, BCA members are contractors who perform work from the ground up while GCA members work from the ground down, i.e., excavation and service on tunnels and subways.

As more fully described by the Administrative Law Judge, the complaint allegations are interrelated and arise out of a series of events that are not substantially in dispute. For some time before May 1980,[1] different minority groups visited GCA and BCA members' construction sites and either requested or demanded employment opportunities in the construction trades. During one such incident, on May 6, a confrontation occurred and an iron worker suffered an injury. Subsequently, a number of work stoppages by employees represented by Respondent occurred at various worksites where employers represented by BCA were working.

On May 8, Theodore King, GCA's assistant manager, received a phone call from John Cody, the Union's president, inviting him to a meeting that day at the BCA to discuss the question of assigning armed guards on construction sites. King asked what kind of guards Cody was talking about and Cody replied, "282 guards to protect 282 members." Cody further told King that he had spoken previously to BCA, that he had a couple of jobs that were on strike, and that it was GCA's turn next.[2]

The meeting at the BCA's offices on May 8 was attended by representatives of BCA, GCA, and Respondent. Credited record testimony shows that Cody made a demand that armed guards represented by Respondent be hired at construction sites. Later in the meeting, Cody modified his proposal to require two Teamsters with walkie talkies at every jobsite. Cody also said that those who did not agree with his proposal could be on strike the following morning and that his proposals were nonnegotiable. The GCA representative, King, requested time for GCA to discuss the matter and Cody agreed.

Sometime after May 8, Respondent obtained individual agreements with about five or six employer-members of BCA that provided, *inter alia*, for "two (2) safety personnel at each gate on a job site . . . equipped with a walkie-talkie at the Employer's expense . . . ." Pursuant to such agreements, BCA employer-member signatories did hire employees to perform the stated functions.

On May 21, Respondent's members employed by various GCA members at various construction sites ceased work. That same day, the GCA filed for an injunction in the Federal district court, seeking to enjoin the Union from breaching the no-strike clause in the collective-bargaining agreement. Also on May 21, a number of conversations took place between representatives of the struck companies, the GCA, and Respondent. Such conversations revealed that Respondent intended to continue the strike while talks went on and that one working Teamsters foreman stated that the men were not working because of the problems with minority groups invading the sites and that Respondent wanted guards at the shafts with walkie-talkies.

On May 22, Respondent's business agent, Joe Matarazzo, told the working Teamsters foremen at certain jobsites that the strike was not sanctioned by the Union, was illegal, and that they should go back to work. The working Teamsters foremen refused to return to work. From a composite of the

[1] All dates are 1980 unless otherwise indicated.

[2] Cody did not deny the substance of the conversation with King on May 8.

testimony of Respondent's business agent, Matarazzo, and working Teamsters Foreman Lypen, the Administrative Law Judge found that Respondent made no real effort to get the men back to work and simply gave up after the negative responses of the working Teamsters foreman. Thus, there was no testimony that the striking members were told that they might be subject to union sanctions if they persisted in the work stoppages or that the working Teamsters foremen could be removed by Respondent.

The Administrative Law Judge also found that the evidence showed that the strikes were planned at a May 19 meeting of the working Teamsters foremen employed by GCA members. As part of this plan, men were to be stationed at the delivery entrances of the construction sites to tell drivers seeking to enter the sites the nature of the dispute. Although no picket signs were displayed and no leaflets were handed out, the credited evidence shows that supplies and equipment that were scheduled for delivery on May 21, 22, and 23 were not made at certain GCA jobsites.

On May 23, a Federal district judge issued a consent order that directed, *inter alia*, that Respondent's members shall immediately resume work. On May 28, representatives of Respondent and GCA held a meeting to discuss the dispute and a few days later, after no agreement had been reached on the merits of the dispute, an arbitrator was selected.

We agree with the Administrative Law Judge's conclusions as to the complaint allegations except that we find that Respondent's conduct also violated Section 8(b)(1)(A) and (2). We also conclude that his rationale for finding the 8(b)(7)(C) and (b)(3) violations must be revised in part, because we find that the new class of employees sought by Respondent were guards within the meaning of the Act.

In arriving at the 8(b)(7)(C) and (b)(3) violations, the Administrative Law Judge found that the new employees sought by Respondent were not guards within the meaning of the Act but rather were "a new classification of employees [who would] perform functions not contemplated by the parties when they entered into their collective bargaining agreement." In so finding, the Administrative Law Judge relied on, *inter alia*, his findings that the details of the new employees' duties were never spelled out and that their functions were to be determined by the working Teamsters foremen without input by the GCA employer-members. Further, he relied on the absence of evidence that Respondent intended to invest these employees with the powers to carry guns, to arrest people, or to carry out company rules against anyone. Instead, he found that Respondent was proposing a self-help or vigilante-type solution to the problem of protecting its members on the construction sites.

Section 9(b)(3) expressly provides that a statutory guard is an individual employed to "enforce against employees and other persons rules to protect . . . the safety of persons on the employer's premises . . . ." In applying this section to the record evidence we are struck by the obvious parallel of the Administrative Law Judge's own factual findings. Thus, he found, *inter alia*, that Respondent's plan was to have the newly sought employees "prevent access to the community groups discussed," and "to protect its own members and other tradesmen working on the construction sites." Despite this parallel between the statute and the record evidence, the Administrative Law Judge rejected the General Counsel's contention that the employees would be statutory guards because "the intent of the Union was not to have these additional employees enforce company rules to protect property or persons." We do not agree with this latter finding by the Administrative Law Judge.

Implicit in Respondent's demand for persons to be stationed at the gates of each construction site to prevent access to certain persons is a concomitant demand for a revision or modification of the employers' rules regulating access to the jobsite. While such a rule change may have a narrow purview, it cannot be gainsaid that Respondent did not consider the employers' rule but only its demand that employer-members provide for the safety of Respondent's members on the jobsite. To find otherwise would be to ignore Respondent's characterization of the seriousness of the threats of "marauding groups" and its single-mindedness in pursuing the demand to have "282 men protect 282 men." To find otherwise also would require an anomalous and unjustifiable result. Plainly, keeping out persons who threaten the safety of persons on the employers' premises is the essence of a guard's duties in common parlance and in the language of the Act.[3] Accordingly, we find that the newly sought

[3] It is not critical that the details of the disputed jobs were never spelled out because of the unusual circumstances in which the guards issue arose. Most Board determinations of statutory guard status occur where the disputed persons are already performing the job duties. No such evidence is possible here because the GCA members never hired anyone for the new positions sought by Respondent. Hence, our determination, by necessity, looks to Respondent's characterization of the intended job duties, with special emphasis on the circumstances that caused Respondent to seek the new positions. It is clear that Respondent's stated concern was to protect its members by denying access to jobsites by certain groups. Inherent in that task was the possibility that the newly sought employees would confront intruders. See, for example, *Electro-Protective Corporation of Georgia*, 251 NLRB 1141 (1980).

employees would be guards within the meaning of the Act.

In his analysis of the 8(b)(7)(C) complaint allegations, the Administrative Law Judge found, *inter alia*, that the action by the working Teamsters foremen on May 21, 22, and 23 conveyed a "signal" to the drivers of trucks making deliveries to affected GCA jobsites to refuse to make deliveries. He further found that such actions constituted picketing within the meaning of Section 8(b)(7)(C), that Respondent was legally responsible for the strike and picketing activity, and that an object of the picketing was to force or require GCA members to recognize and bargain with Respondent who was not currently certified or recognized as the representative of such newly sought employees.

We agree with the foregoing findings by the Administrative Law Judge. Unlike him, however, we do not rest the 8(b)(7)(C) violation on the fact that an election petition could not be processed because of "the nonexistence of the voter unit." Instead, we rely on our finding that the newly sought employees were guards within the meaning of the Act and that Respondent is ineligible to be certified as the collective-bargaining representative because it would be admitting both guards and nonguards to membership. Section 8(b)(7)(C) proscribes picketing for such an object. *General Service Employees Union Local No. 73, affiliated with Service Employees International Union, AFL–CIO (A-1 Security Service Co.)*, 224 NLRB 434 (1976). As no election petition could have been filed, the Board has held such picketing for any duration to be a violation of Section 8(b)(7)(C).[4]

In finding the 8(b)(3) violation, the Administrative Law Judge relied on, *inter alia*, evidence that Respondent struck and picketed in furtherance of its demand that GCA employer-members alter or modify the existing collective-bargaining agreement to include a new class of employees not covered in the unit. We have found such employees to be guards within the meaning of the Act. Thus, while we agree with the Administrative Law Judge's finding that Respondent's conduct violated Section 8(b)(3), we modify his rationale to the extent that we find that Respondent sought to bargain with the Employer regarding a classification of employees—guards who were not in the unit.

We also find merit in the General Counsel's exceptions to the Administrative Law Judge's dismissal of the 8(b)(1)(A) and (2) allegations. The Administrative Law Judge found that the evidence failed to support these allegations which are based on the General Counsel's contentions that Respondent demanded a closed shop agreement for future jobs by demanding that the GCA members hire only Respondent's members for the newly sought positions as guards. He relied on the absence of evidence that Respondent told the GCA that they could not hire new employees who were not union members or that any nonunion individual either sought or was denied employment by any of the BCA employers. Further, he pointed out that Respondent's contract with the GCA has a valid union-security agreement and there is no evidence that the Union made any demand to modify this provision. In addition, he found that Respondent does not operate a hiring hall for referrals or maintain a seniority system for construction hiring. Finally, the Administrative Law Judge found that Cody's statements that "I want 282 men to protect 282 men" does not of necessity translate into a demand for union membership as a condition of hire. Instead, he found it more reasonable to conclude that Cody meant he wanted men represented by Local 282 to protect Local 282 members. For these reasons, the Administrative Law Judge rejected the General Counsel's 8(b)(1)(A) and (2) contentions as well as the Charging Party's argument that Cody's demand was one designed to discriminate against the hiring of minorities.

In support of the 8(b)(1)(A) and (2) allegations, the General Counsel relied on, primarily, statements by Respondent's president, Cody, that he wanted "282 men to protect 282 men." He also relied on the fact that employees hired by BCA members pursuant to Respondent's demands were already members of Respondent at the time of their hire.

In assessing Cody's demand that he wants "282 men to protect 282 men," it is necessary to weigh the realities of the circumstances that gave rise to Respondent's demand. As more fully described by the Administrative Law Judge, different minority groups had visited BCA and GCA member construction sites either to request or demand employment opportunities in the construction trades for some time before May. During one such incident a confrontation occurred and a worker was slashed on the arm. It was immediately after this slashing incident that Respondent demanded that BCA and GCA members hire armed guards represented by Respondent and later modified its proposal to require two members of Respondent with walkie-

[4] See *General Service Employees Union Local No. 73, supra*, and the cases cited therein.

For reasons set forth in his dissents in *General Service Employees Union Local No. 73, affiliated with Service Employees International Union, AFL–CIO A-1 Security Service Co.)*, 224 NLRB 434, 437 (1976), and *Drivers, Chauffeurs, Warehousemen and Helpers, Local Union No. 71, IBT Wells Fargo Armored Service Corporation)*, 221 NLRB 1240 (1975), Member Fanning would find that the picketing herein did not violate Sec. 8(b)(7)(C) of the Act.

talkies at each jobsite. It is in this context that the statements by Respondent's officials must be evaluated.

Aside from Cody's demand to have "282 men . . . protect 282 men," other record evidence shows that Respondent was not seeking simply to increase protection for employees on the jobsite but was seeking job opportunities for its own members to protect its members on the jobsite. Thus, Cody stated: "I don't give a damn how many guards are hired. My people listen to my people." And Respondent's officers said repeatedly that its members wanted to be reassured their jobs were safe "by our own people" and "by their brother members."

We do not share the Administrative Law Judge's assessment that it is "just as reasonable, indeed more so, to conclude" that Respondent merely wanted men represented by Local 282 to protect its members. The record indicates that it is more reasonable to assume that Respondent would have balked at the hiring of members of any of the minority groups who sought employment at the BCA and GCA jobsites, even if such minority new hires became members of Respondent. While no evidence shows that this scenario actually occurred, it is significant that Respondent pressured GCA members to exclude members of such groups from the jobsites and this consideration is relevant in assessing the statements by Respondent's officials. It also cannot be overlooked that Respondent did not ask the GCA employers themselves to hire more guards but undertook to solve what it conceived to be a problem by demanding that its members only be hired. Thus, we are persuaded by the record as a whole, particularly the circumstances surrounding Respondent's demand to have "282 men . . . protect 282 men" coupled with numerous statements by Respondent's officials, that Respondent insisted on its own members being hired to protect other members working on the jobsites. Accordingly, the record is clear that Respondent was demanding that the GCA employers hire only Respondent's members for these newly sought positions, in violation of Section 8(b)(1)(A) and (2) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Local 282, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, its officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Picketing or causing to be picketed the employer-members of the General Contractors Association of New York, Inc., where an object thereof is to force or require said employers to recognize or bargain with Respondent as the collective-bargaining representative of a new classification of employees found to be guards within the meaning of the Act which Respondent proposes to be hired by such employers, when Respondent has not been certified as the representative of such employees and cannot be certified by virtue of the provisions of Section 9(b)(3) of the Act.

(b) Refusing to bargain in good faith, by picketing or striking the employer-members of the General Contractors Association of New York, Inc., in order to force or require said employers to alter or modify the existing collective-bargaining agreement and bargaining unit, by seeking to compel said employers to hire and create a new classification of employees found to be guards within the meaning of the Act to be covered by said agreement that does not cover any classification of employees defined as guards.

(c) Picketing, threats, or other action, seeking to require, force, or compel the employer-members of the General Contractors Association of New York, Inc., to require membership in Respondent as a condition of hiring for the new classification of jobs found to be guards within the meaning of the Act.

2. Take the following affirmative action which will effectuate the purposes of the Act:

(a) Post at Respondent's business offices and meeting halls copies of the attached notice marked "Appendix A."[5] Copies of said notice, on forms provided by the Regional Director for Region 29, after being duly signed by the Union's representative, shall be posted by the Union immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Union to ensure that copies of said notices are not altered, defaced, or covered by any other material.

(b) Mail to the Regional Director for Region 29 signed copies of the aforementioned notice for posting by the employer-members of the General Contractors Association of New York, Inc., if they are willing, in places where notices to employees are customarily posted. Copies of said notice to be

[5] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

furnished by the aforesaid Regional Director, shall, after being signed by the Union as indicated, be returned forthwith to the Regional Director for disposition.

(c) Notify the Regional Director for Region 29, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT picket or cause to be picketed the employer-members of General Contractors Association of New York, Inc. (herein called the GCA), where an object thereof is to force or require said employers to recognize or bargain with us as the collective-bargaining representative of a new classification of employees found to be guards within the meaning of the Act which we have proposed to be hired by said employers, when we have not been certified as the representative of such employees and cannot be certified by virtue of Section 9(b)(3) of the Act.

WE WILL NOT seek by picketing, threats, or other actions to require, compel, or force the employer-members of General Contractors Association of New York, Inc. to require membership with us as a condition of hiring for the new classification of jobs found to be guards within the meaning of the Act.

WE WILL NOT refuse to bargain in good faith with the GCA by picketing or striking the employer-members of the GCA in order to force or require said employers to alter or modify the existing collective-bargaining agreement and bargaining unit, by seeking to compel said employers to hire and create a new classification of employees found to be guards within the meaning of the Act to be covered by said agreement that covers nonguard employees.

The appropriate collective bargaining unit is one including all truck drivers and Working Teamsters Foremen employed by the employer-members of the General Contractors Association of New York, Inc., excluding all other employees, guards and supervisors as defined in the Act.

LOCAL 282, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge: These consolidated cases were heard before me on August 5-8, 1980.[1] The charges in question were all filed by The General Contractors Association of New York, Inc., herein called the GCA, on June 4, 1980. Based on the charges, the Regional Director of Region 29 issued an order consolidating cases and consolidated complaint and notice of hearing on July 17, 1980.

The issues raised by the complaint are as follows:

1. Whether Respondent, which represents truckdrivers employed by employer-members of the GCA, made a demand upon the GCA and its members that they hire persons who would be classified as guards within the meaning of the Act.

2. Whether, in furtherance of its demand described above, Respondent threatened to engage in and did engage in picketing of GCA members on May 21-23.

3. Whether such activity on the aforesaid dates, if construed as picketing, was for a recognitional or organizational object, conducted for more than a reasonable period of time without a representation petition having been filed, and therefore constituted a violation of Section 8(b)(7)(C) of the Act.

4. Whether Respondent threatened a strike and thereafter engaged in a strike against GCA members on May 21, 22, and 23 in furtherance of its demands described above in paragraph 1, in order to compel the GCA and its members to bargain in a unit other than the one in which Respondent has historically been recognized, and therefore violated Section 8(b)(3) of the Act.

5. Whether, in conjunction with the demand described above in paragraph 1, Respondent also demanded that the GCA and its members agree to hire and employ, as guards, only members of Respondent and whether, by picketing and/or striking GCA members in furtherance of such demand, Respondent violated Section 8(b)(1)(A) and (2) of the Act.

6. Whether the strike and picketing activity alleged to have been engaged in was done with the authorization or condonation of Respondent.

7. Whether Respondent in June and July made demands on various GCA members that they enter into contracts or agreements, whether expressed or implied, to cease doing business with various suppliers making deliveries to construction sites where such suppliers employ drivers who are not members of or represented by Respondent or by local unions affiliated with the Interna-

[1] Unless otherwise indicated all dates are in 1980.

tional Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

8. Whether Respondent, in furtherance of such alleged demands described above in paragraph 7, threatened strikes or work stoppages by employees employed by members of the GCA or otherwise threatened, coerced, or restrained such persons and therefore violated Section 8(b)(4)(ii)(A) of the Act by engaging in prohibited conduct to force or require such persons to enter into contracts or agreements outlawed by Section 8(e) of the Act.[2]

Based on the entire record in this proceeding, including my observation of the demeanor of the witnesses, and after reviewing the briefs filed in this matter,[3] I make the following:

FINDINGS OF FACT

I. JURISDICTION

The complaint alleges, the answer admits, and I find as follows:

The GCA is a nonprofit New York corporation consisting of employer-members who are engaged in construction work throughout the United States. In part, the GCA serves the function of negotiating and administering collective-bargaining agreements on behalf of its members with various labor organizations including Respondent. During the past year the employer-members of the GCA performed construction services outside the State of New York valued in excess of $50,000 and purchased materials, goods, and supplies valued in excess of $50,000 from firms located outside the State of New York which were delivered to their construction sites within the State of New York. Accordingly, I find that the GCA and its employer-members constitute a multiemployer bargaining association and that it and its members are persons and employers engaged in commerce within the meaning of Section 2(1), (2), (6), and (7) of the Act. I further find that it would effectuate the purposes and policies of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

It is conceded and I find that Respondent is a labor organization within the meaning of Section 2(5) of the Act.

III. THE COLLECTIVE-BARGAINING RELATIONSHIP BETWEEN RESPONDENT AND THE GCA

As noted above, Respondent represents truckdrivers employed by employer-members of the GCA in a multiemployer bargaining unit. The most recent contract has a term from July 1, 1978, to June 30, 1982. The truckdrivers employed by the GCA members generally are used to drive vehicles such as dump trucks on construction sites. Additionally, they sometimes drive vehicles between construction sites and between an employer's offsite facility and the site itself. On other occasions a driver may be called upon by his employer to pick up a piece of equipment or materials from a supplier. The collective-bargaining agreement between Respondent and the GCA does not, in any way, purport to cover any classification of employees defined as guards.

The contract contains a standard union-security clause requiring membership in Respondent after the 30th day of employment or after the 30th day of the execution of the contract whichever occurs last. There is no provision requiring employers to give the Union first preference in the referral of people for employment and the evidence establishes that the Union does not operate a hiring hall or seniority list for the purpose of referring people to GCA members for jobs. In this respect, new employees are generally hired through a shapeup system at the construction sites although it does appear that, from time to time, union officials may recommend people to GCA employers for employment.

The collective-bargaining agreement in question contains no-strike and grievance-arbitration procedures which were invoked in this matter as described below. Also, the contract provides for the appointment, by the Union, of shop stewards and working teamsters foremen. Both of these classifications are defined by the contract as being employees who are authorized to administer the contract on behalf of the Union. It appears from the record that a shop steward is a person who administers the collective-bargaining agreement on an employerwide basis whereas a working teamster foreman administers the contract at a particular construction site of an employer. In either case, it is clear from the terms of the collective-bargaining agreement that both shop stewards and working teamsters foremen are agents of the Union.[4] *N.L.R.B.* v. *Local Union No. 3, International Brotherhood of Electrical Workers, AFL-CIO (New York Telephone Company)*, 467 F.2d 1158 (2d Cir. 1972).

With respect to the 8(b)(4)(A) allegation, there is nothing in the collective-bargaining agreement which purports to regulate with what suppliers of goods the GCA members can do business with. That is, there are no provisions requiring the employer-members of the GCA to cease or refrain from doing business with any supplier or person who is not a signatory to a contract with or does not employ members of Respondent or any other labor organization, or who otherwise has a labor dispute. The only provision of the contract dealing with the relationship between suppliers and members of the GCA appears at section 6(m) which reads:

> The seller who delivers materials shall use its own available suitable equipment first and then use the buyer's available suitable equipment before it secures equipment from others.

It is apparent from the testimony that the intendment of this provision is to allow a GCA employer to use its own trucks and employees to pick up supplies only in

[2] I note that neither the charges nor the complaint alleges that Respondent engaged in any conduct for any object prohibited by Sec. 8(b)(4)(B) of the Act.

[3] In addition to the briefs filed by the parties, an amicus brief was filed by the Construction Users Council.

[4] The collective-bargaining agreement also provides that the WTF has the authority to "coordinate safety efforts relating to Teamsters on the site."

the event that a supplier cannot itself effect delivery. In this regard, it is noted that many of the local suppliers to GCA members such as those who supply lumber, concrete, piping, and cement also have contracts with the Union and employ drivers who are members of or represented by the Union.

Although not required in the contract between the GCA and the Union, it appears that the employers and the Union have, on occasion, made arrangements at construction sites whereby a drop off point is established for the delivery of goods from outside suppliers so that the drivers of such trucks do not perform construction site driving which is performed by the employees of GCA members who are represented by Respondent.[5] I have also noted that Respondent has collective-bargaining agreements with many of the suppliers to construction sites. As it would appear that the contracts cover the truckdrivers employed by those companies and contain union-security clauses, one means by which Respondent polices those contracts is by having the working teamsters foremen at the construction sites check to see if the drivers of such vehicles are paid up members of Respondent.

IV. THE ALLEGED VIOLATIONS OF SECTION 8(B)(1)(A), (2), (3), AND (7)(C)

All of these allegations are interelated and involve the same series of transactions. Much of the testimony concerning these transactions is not in dispute.

For some time prior to May 1980 different minority groups have gone to construction sites and either requested or demanded employment opportunities in the construction trades. On May 6, one such group visited a construction site in Manhattan and, during a confrontation on the 30th floor of the building, an iron worker suffered an injury, having been slashed on the arm. Subsequent to the May 6 incident there were a number of work stoppages by employees represented by the Union at various sites where employers represented by another multiemployer association were working.[6]

According to Theodore King, the assistant manager and assistant director of labor relations for the GCA, he received a phone call on May 8 from John Cody, the Union's president. King testified that Cody invited him to a meeting to be held that day at the BCA to discuss the question of armed guards on construction sites. When King asked what kind of guards Cody was talking about, Cody replied, "282 guards to protect 282 members." According to King, Cody stated that he had previously spoken to the BCA, that he had a couple of jobs that were on strike, and that it was the GCA's turn next. The substance of this telephone call was not denied by Cody.

On the afternoon of May 8 a meeting was held at the BCA's offices between the Union and that organization. King, pursuant to Cody's request, attended on behalf of the GCA. King testified that, when Cody came in, a representative of a company called Diesel asked why he was on strike to which Cody replied that he was tired of blacks invading jobsites and hurting people and that he was going to start a system to make sure that no one on the sites would get hurt. According to King, Cody said his men were too scared to work and that Cody initially proposed that there be one armed teamster on every floor of a high rise building and two armed teamsters at every gate of a construction site. King asked Cody if he meant people who would carry guns to which Cody responded that he wanted 282 men to guard 282 people. King states that at this point Cody left the room with a representative of the BCA and after Cody's return he modified his proposal to a requirement that there be two Teamsters with walkie-talkies at every jobsite. King also testified that Cody said that those who did not agree to his proposal would be on strike the following morning and that his proposals were nonnegotiable. According to King, when he said that this question had not been discussed by the GCA and that he needed more time, Cody agreed. As to the function of the extra Teamsters at the jobsites, King testified that Cody said that they would carry walkie-talkies to call other people who would give their help in case of marauding gangs invading a jobsite. King states that when he asked what Cody meant by help, the latter responded by saying "don't ask." King also states that Cody said that he would expect the contractors to continue to pay a man's full salary and court costs in the event that someone was involved in a dispute, "busted a few heads," and ended up in jail or hurt. King finally testified that he told Cody that there was a grievance procedure in the contract and that the GCA did not want to end up in the NLRB or in Foley Square.[7]

[5] In *Local 282 International Brotherhood of Teamsters (Allco Concrete Products Co., Inc.)*, 234 NLRB 770 (1978), the Board held the provision in a contract between the Respondent and another association (the Building Contractors Association, Inc.), limiting a supplier to a single delivery or pickup, constituted an unlawful 8(e) agreement. That provision, which was contained in the 1975 to 1978 contract with the BCA and which is not contained in the current agreement with the GCA, reads as follows:

> 2. The driving of all trucks at the site of construction in connection with work which the Employer is contracted to be responsible for, manage, or perform, shall be performed by employees of the Employer and covered by this Agreement provided that the Employer may contract or subcontract said work only to an employer or person who is party to or bound by this agreement, regardless of past practice and custom. This section shall not apply to the driving of a truck entering or leaving the site of construction for the sole purpose of making a single delivery and/or single pick up from the construction site of materials, tools or personnel, provided such single delivery and/or pick up may be made only to (or from) a single location per delivery or pick up on the site. A truck making a single delivery to a single location may make a single pick up from a separate single location.
>
> The provisions of this Agreement re on-site trucking shall be made a condition of any supply contract, and any contract or subcontract awarded or "managed" by the Employer covered by this Agreement.

[6] The other association is the Building Contractors Association (BCA). That Association also has a collective-bargaining agreement with the Union covering truckdrivers. In general terms, the members of the BCA are contractors who perform work from the ground up, whereas the members of the GCA work from the ground down. That is, GCA members do excavation, and perform contracting services on tunnels, subways, etc.

[7] The United States District Court for the Southern District of New York is located in Foley Square.

Cody, who testified about the May 8 meeting, conceded that he made a demand that armed guards represented by his Union be hired at construction sites. He states, however, that this demand was merely a bargaining ploy which he quickly dropped in favor of his demand for men with walkie-talkies to be stationed at construction gates whose function would be to stand watch and alert the other employees in case gangs appeared and tried to enter construction sites. He also denied making any threats to strike or picket.

Sometime after May 8, the Union obtained individual agreements with about five or six employer-members of the BCA. These agreements state:

> WHEREAS, there is presently a Collective Bargaining Agreement in effect between the Union and the Employer, effective July 1, 1978,
>
> WHEREAS, the Union and the Employer are concerned about the safety and welfare of the local Union members on the job sites covered under the Collective Bargaining Agreement,
>
> WHEREAS, the Union and the Employer hereby amend the Collective Bargaining Agreement.
>
> IT IS THEREFORE AGREED by and between the Union and the Employer that a new paragraph numbered "7" is to be added and made a part of Section 25 of the Collective Bargaining Agreement (High-Rise Contract 1978–1982) and shall read as follows:
>
> "7. There shall be two (2) safety personnel at each gate on a job site and each personnel shall be paid regular wages and be entitled to the same fringe benefits and working conditions as the Employees covered under this Agreement. Each of these personnel shall be equipped with a walkie-talkie at the Employer's expense. If an Employee shall lose any time from employment as a result of the performance of his job duties for which he is not compensated under the Workers' Compensation Law, he shall be reimbursed in full for all lost wages and expenses."
>
> IT IS FURTHER AGREED that all other terms and conditions of the Collective Bargaining Agreement shall remain in full force and effect.

In connection with the above agreement, the employer-members of the BCA who signed it did hire employees to perform the stated functions. In this respect, Sasso testified that a member of the Union named Joe Murray was hired at the site where the ironworker had been slashed and his description of Murray's duties was as follows:

> Q. Do you know about [sic] Joe Murray's job duties are at the Fisher site?
>
> A. Yes, he assists the Working Teamster Foreman as far as the safety is concerned. They have something set up between themselves that Joe Murray being the watch for the minority gangs, or whatever you want to call them, come around, they have a signal among themselves to alert the job that they're on the way.
>
> JUDGE GREEN: Is that all he does?
>
> THE WITNESS: Yes.

Sasso also testified that the purpose of the man was to protect the employees on the job along with their equipment and property:

> Q. So, another aspect of this thing about getting a safety man on is to make sure—the equipment doesn't get bashed up so they can't work. Isn't that correct?
>
> A. We help everybody.
>
> JUDGE GREEN: Well, is it a correct or not correct statement?
>
> THE WITNESS: Well, we don't want the employees—either.
>
> JUDGE GREEN: How about their personal property?
>
> THE WITNESS: Their personal property? What do you mean by that?
>
> JUDGE GREEN: Automobiles.
>
> THE WITNESS: All I know is that we were trying to protect our people.
>
> JUDGE GREEN: You're talking about protecting their bodies or protecting their —.
>
> THE WITNESS: Protecting their bodies, protecting the equipment and protecting everybody else on the job.
>
> JUDGE GREEN: When men represented by your union work at construction sites, do they at times take their automobiles?
>
> THE WITNESS: Yes.
>
> JUDGE GREEN: Do they park near or at the job sites?
>
> THE WITNESS: Yes.
>
> JUDGE GREEN: Do they ever have an occasion to park inside the gates of job sites or is that not—.
>
> THE WITNESS: No, they could do that too.

According to Joseph DiCarolis, a senior vice president of Schiavone Construction Co. (which is a member of the GCA), he spoke to Robert Sasso the Union's secretary-treasurer on May 14. DiCarolis testified that Sasso told him that a number of builders had signed agreements with the Union regarding the guard question but that the Union expected trouble from the larger contractors and that there probably would be some strikes. King testified that on May 16 he also had a phone conversation with Sasso who told him that there would be strikes on Monday morning (May 19) of all the sewer contractors, the water tunnel jobs, and, the jobs of Schiavone, Slattery, and Red Hook. King stated that he told Sasso that the contract contained a no-strike clause and that they were supposed to talk. He stated that Sasso said he would talk to Cody but that, when Sasso called back, he said that Cody did not want to talk. Sasso did not deny the conversation with DiCarolis, but as to the conversation with King on May 16, he testified:

> I called Ted and told him that the Indians were very restless out on the street. That we were having problems with our people out there because of these minorities and they were very frightened. The fellows were getting hurt all over the place and I told

him to try to put the lid on it, to keep these guys from walking out on the street and they were threatening us that they wanted to hit the bricks. We told them to take it easy. Give us time. We're working on it.

We were speaking to the employers. We were speaking to the BCA trying to get something going with the GCA.

I tried to elaborate to Ted that this was a serious problem as far as we were concerned and we were trying to sit out the membership. These minorities were knocking these guys crazy out in the street.

On May 16, the GCA sent a mailgram to the Union. It states:

> WE HAVE BEEN ADVISED THAT LOCAL UNION 282 IS CALLING FOR AN ILLEGAL STRIKE ON CONSTRUCTION JOBS THROUGHOUT THE CITY. PLEASE BE ADVISED THAT THERE IS A GRIEVANCE PROCEDURE IN OUR PRESENT CONTRACT TO ALLEVIATE ANY SUCH SITUATION. PLEASE BE ADVISED THAT OUR ASSOCIATION WILL USE ALL LEGAL MEANS AT THEIR DISPOSAL IN THE EVENT OF AN ILLEGAL STRIKE.

On May 18, the GCA's attorney, Mattson, called the Union's attorney, O'Conner, indicating that the GCA intended to file for an injunction against the impending strike on Monday. O'Conner's response was that he did not feel that there was a pending strike.

On May 21, the teamsters employed by various GCA members at various construction sites ceased work. These work stoppages occurred at a number of jobsites throughout New York City, including the jobsites of Red Hook Contractors, R. T. Sewer Project Corporation, Slattery Associates, Steers, Spearing & Buckley, and Schiavone Construction Co. The strike continued until May 23. Upon the strike's commencement, the GCA filed for an injunction in the Federal district court[8] and an Order to show cause was signed by Judge Vincent C. Broderick returnable on May 23.

Also on May 21, a number of conversations took place among representatives of the struck companies, the GCA, and representatives of the Union. According to King, he met with Sasso on the morning of May 21 at the offices of the BCA. He stated that he asked Sasso what they could do to get the men back to work and stated that there was a grievance procedure to resolve disputes. King testified that, after Sasso went to talk to Cody, Sasso came back and said that Cody would continue the strike while talks went on. According to Gennaro Liguori employed by Schiavone, he spoke to working Teamsters Foreman Joe Cammarano on May 21 and asked why the men were not working. He stated that Cammarano said they were not working because of the problems with the minority groups invading sites and the ironworker incident and because the Union wanted guards at the shafts with walkie-talkies.

With respect to the work stoppages on May 21 through 23, the evidence establishes that they were directly instigated and caused by the working teamster foremen employed by members of the GCA, that the strikes were planned at a meeting of these men on Monday, May 19, and that, as part of the plan, men were to be stationed at the delivery entrances of the construction sites to tell drivers seeking to enter the sites the nature of the dispute. Although no picket signs were displayed and no leaflets were handed out, the credible evidence establishes that at certain of the sites, such as Red Hook, R. T. Sewer, Slattery, Steers, Spearing & Buckley, and Schiavone, supplies and equipment that were scheduled for delivery on May 21, 22, and 23 were not made. In this connection, Klouse testified that, at the Red Hook jobsite, he saw and heard the working teamsters foreman, Michael Lypen, tell another teamster (Mario DeMaris) to stay at the gate and not to let any trucks come in or out. Klouse also testified that, when a tractor-trailer from E. J. Davis left the jobsite without making a scheduled delivery, he asked Lypen what happened and Lypen said that he had sent the driver away and told him it was a job action. According to Klouse, Lypen then said, "I told you before that there will be no trucks coming or leaving the job site." Also in this regard, Liguori of Schiavone testified that on May 21 he saw Working Teamsters Foreman Cammarano approach a truck scheduled to make a delivery of hardware and talk to the driver whereupon the driver did not make the delivery.

Regarding the above, Lypen testified as follows:

> Q. (By Judge Green) The work stoppage at your job started on May 21 and was May 21, 22 and 23.
>
> A. Right.
>
> Q. I heard a lot of testimony that there were a lot of other job sites where work stoppages also began on May 21 and were on May 21, 22 and 23.
>
> I'll ask you if it is fair to assume that this was no absolute coincidence?
>
> A. No, it wasn't.
>
> Q. Were you a part of a group of Working Teamster Foremen who got together or talked amongst yourselves either in person or over the phone prior to May 21 and arranged this, shall we say, job action?
>
> A. Right.
>
> Q. When did that arrangement take place? When did the planning take place?
>
> A. I guess it was the Monday before.
>
> Q. Do you remember where it was?
>
> A. No. I don't recall.
>
> Q. Was it at the Union hall?
>
> A. No, it wasn't at the union hall.
>
> Q. And, there were other Working Teamster Foremen present at this get-together?
>
> A. Right.
>
> Q. Were there shop stewards also present at the get-together?
>
> A. No, I don't recall.
>
> Q. So, other Working Teamster Foremen involved in this get-together were from jobs of companies other than the one that you were working for?

[8] The GCA sought to enjoin the Union from breaching the no-strike clause in the collective-bargaining agreement.

A. That's right.

Q. At the get-together you decided to do something, I take it?

A. That's right, since nobody else was doing anything.

Q. But, it was the group of Working Teamsters Foremen that decided we have to do something.

Would that be a fair statement?

A. Yes.

Q. And you all made a decision that what? You would have a job action strike on May 21?

A. We didn't call it a strike. We called a job action.

Q. And, would it be fair to say that the Working Teamster Foremen at this get-together on Monday had decided that the job action would involve some Teamsters working at these job sites, stopping work?

A. Us stopping work, yes.

* * * * *

Q. Now, on May 21, May 22 and May 23, did you station yourself at one of the gates or some of the gates of the construction sites on each of those days?

A. Yes.

Q. And there were other people that were stationed at the gates of the construction sites?

A. Right.

Q. All were Working Teamster Foremen or just Teamsters?

A. Teamsters.

Q. Were there any Teamsters who were not Working Teamster Foremen?

A. Yes, I had two drivers that went along with my way of thinking.

Q. Those people were stationed at one of the gates of the job site?

A. Right.

Q. Did they have any signs or things to pass out?

A. No.

Q. Did you give them some kind of instructions?

A. Just to explain our story and let the people judge for themselves accordingly.

Q. I take it when you explain the story, you mean to anybody who was coming through the gate?

A. Right.

Q. So, they were instructed to approach anybody coming to the gate and explain the story. Would that be a fair statement?

A. No, only trucks.

Q. Not to pedestrians?

A. No.

Q. How about people arriving in cars? That you weren't concerned about?

A. No.

* * * * *

Q. Now, do you know whether or not this business about standing at gates at construction sites was one of the things that was talked about at the meeting on Monday with the Teamsters?

A. I don't understand what you're saying.

Q. On Monday you decided—the Working Teamster Foremen had a meeting on Monday. Right?

A. Yes.

Q. And they decided and planned amongst themselves that there was going to be a job action of some sort starting on Wednesday. Right?

A. Right.

Q. Now, in addition to talking about withdrawing your labor, was it also decided that people were going to stand at gates or do something at the construction sites on those days rather than go home and watch television?

A. No, how was we going to get our story across if we were at home watching television.

Q. So, it was decided that people would be stationed at gates?

A. Each Teamster Foreman was to take care of his own site.

On May 22, Business Agent Joe Matarazzo visited the jobsites of Slattery and Horn where he spoke to the working teamsters foremen. His testimony was that he told these men that the strike was not sanctioned by the Union, that the strike was illegal, and that the men should go back to work. Matarazzo testified that, at both sites, the working teamster foremen refused to return to work and that he did not go to the Schiavone construction site because when he passed by he did not see the working teamsters foremen and figured that, in any event, he would get the same response. Apart from the above, Matarazzo's testimony gives the clear impression that neither he nor any other union official made any great effort to get the men back to work, and simply left when met with negative responses. By his own testimony, Lypen did not attempt to discuss the underlying dispute with these men or attempt to reason with them. He did not tell them that they might be subject to union sanctions if they persisted in the work stoppages or that they could be removed as working teamsters foremen by the Union. Thus, despite the Union's halfhearted effort to return the men to work on May 22 they did not return to work until after Judge Broderick issued a consent order on May 23.

On May 23, Judge Broderick issued an order stating:

> 1. The parties are immediately to submit for resolution according to the "Settlement of Disputes" provisions of their collective bargaining agreement the following issues:
>
> (a) whether plaintiffs have provided safe workplaces for employee members of defendant union, and if not, what is to be done about it;
>
> (b) such other related issues as the parties may submit, including the issue of whether the work stoppages that are the subject of this litigation are the result of a strike or are the result of individual employee apprehensions with respect to conditions

of safety in their workplaces, and the issue of plaintiff's damages;

(c) the employees of defendant union whose work stoppages are the subject matter of this litigation are immediately to resume their work;

(d) this court retains jurisdiction until final resolution of the matters presented.

On May 28, representatives of the Union and the GCA had a meeting to discuss the dispute. At this meeting the Union tendered to the GCA a copy of the individual agreement signed by various BCA members. As no agreement was reached, the parties agreed to meet again on June 2. No agreement being reached on June 2, an arbitrator was selected. Arbitration commenced before Herbert Lippman and, at the time of this hearing, the GCA and the Union had not yet completed the arbitration case.[9]

V. THE 8(B)(4)(II)(A) ALLEGATION

This allegation is premised on the contention that Respondent engaged in conduct prohibited by Section 8(b)(4)(ii) of the Act for the object of forcing or requiring employers to enter into an agreement prohibited by Section 8(e) of the Act.[10] Nevertheless, counsel for the General Counsel concedes that no written contract or agreement arguably prohibited by Section 8(e) was ever tendered to the GCA or its members. Nor does she allege that the Union engaged in any conduct for the purpose of reaffirming or reentering into any existing contract or agreement which either is violative of Section 8(e) on its face or subject to an 8(e) application.[11] Rather, counsel for the General Counsel contends that a number of statements made by Cody, and other union agents, in March, June, and July may be construed so as to infer that the Union sought to enter into an oral agreement requiring GCA employer-members to cease doing business with suppliers who do not have contracts with the Union or other locals of the International Brotherhood of Teamsters. She also contends that in furtherance of such object, agents of the Union threatened GCA members with strikes and work stoppages.

According to Joseph Ivani, general manager of R. T. Sewer Project Corporation, a delivery of pipe was made to the jobsite by two trailers from Mancrete Concrete Pipe of New Jersey in March 1980. He testified that, when the trailers arrived at the site, two teamsters went to check the union books of the drivers, whereupon Joe Matarazzo, a union business agent, came over to him. Ivani testified:

> He said, "This doesn't go, we're trying to protect our member of the union, you know, we wouldn't mind if they were Teamsters, but these guys don't even belong to any of the Teamsters unions, they says 'We're not going to let you unload this pipe,' he says, 'unless one of our men get a day's pay for it.'" So rather than get into a hassle with the guy, I needed the pipe and the work had to continue, I agreed to pay him one day's pay, so he permitted me to unload the two trailers and the union called into my office and gave me the name of a Teamster who was sick and we sent him a day's pay.

Regarding the above incident, Matarazzo testified that when he arrived at the site he saw that the pipe was not being delivered to a single delivery spot as had been previously arranged. He stated that when he noticed this irregularity he spoke to the job superintendent who acknowledged a mistake and said, "Ok, if I have to, I'll pay a day's pay." According to Matarazzo when the superintendent said, "I don't want you to stop my job," he responded by saying, "I'm not stopping your job."

According to Joseph DiCarolis, on June 2, when the GCA representatives went to the union office to meet on the "guard" issue, there was some delay prior to the meeting. He states that John Cody said that the delay was created, in part by his discussion with the working teamsters foremen who were complaining that deliveries were being made by drivers who were not members of the Union. DiCarolis testified that Cody just mentioned what the working teamsters foreman were complaining about. DiCarolis did not testify that Cody made any demand of any kind. Cody acknowledged a discussion of this subject at this meeting but testified that the problem he related was that suppliers having contracts with his Union were using nonunion men to make deliveries to construction sites and that "this irritated our members very much especially with the unemployment problem we have."

Also on June 2, the testimony of Donald O'Hare was that on that morning he spoke with Working Teamsters Foreman Charles Fornabia on the Slattery job who said he had to go to a union meeting. According to O'Hare, he spoke again with Fornabia later in the day asking

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[9] As to the BCA, that Association apparently agreed to be bound by the results of the arbitration between the GCA and the Union.

[10] In pertinent part, Sec. 8(b)(4)(ii)(A) makes it unlawful for a labor organization to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:

> (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by section 8(e).

Sec. 8(e) states:

> (e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: *Provided*, That nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work . . . .

[11] In circumstances where an agreement between a union and an employer contains an 8(e) provision which has been entered into beyond the 10(b) period or where an agreement containing an ambiguous clause executed beyond the 10(b) period is utilized by a union to reach an 8(e) objective, conduct engaged in by a union which would be prohibited by Sec. 8(b)(4)(ii) has been construed as violative of Sec. 8(b)(4)(A). In such cases, the Board has held that such conduct has an object of forcing or requiring an employer to reenter into an 8(e) agreement. *Local 814, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Santini Brothers, Inc.)*, 208 NLRB 184 (1974).

what had happened. O'Hare states, "he told me that any deliveries within 282's jurisdiction must have a signed contract with the Teamsters." Fornabia was not called as a witness by Respondent.

According to Donald O'Hare, Slattery's project superintendent, he was expecting delivery of a precast transformer from A. Carlson & Sons on June 4. He testified that, in connection with this delivery, Matarazzo told him that, if he did not want the job to be shut down, he better send one of his own trailers to pick up the transformer or have Carlson get a 282 trucker to bring it in. According to O'Hare, his company then contacted Carlson about the problem and the transformer was delivered. Matarazzo's testimony concerning this incident was that, at the time, there was a labor dispute between the Union and Carlson which had had a contract with Respondent. He testified that when he learned that Carlson was making a delivery to the Slattery site he spoke to Donald O'Hare and merely asked if the transformer could be picked up by Slattery, "because this way we'll have no problem with our guys that are off"; i.e., unemployed. According to Matarazzo, O'Hare agreed to the proposal.

According to Herman Klouse he had deliveries scheduled for the Red Hook job on June 4 to be made by a New Jersey company. He stated that on that date Lypen told him that one of the delivery drivers had a Teamsters book but could not prove he was paid up in his dues and that, when one of the drivers had challenged Lypen's right to ask such questions, Lypen had sent two of the trucks away. Lypen essentially concedes this issue. I note, however, that there was no testimony that Lypen threatened Red Hook with any strike or work stoppage if the delivery was made and the testimony merely shows that Lypen told the New Jersey drivers to leave and that they complied.

The General Counsel also relates an incident that happened in July on a Crimmens jobsite. In this respect King testified that in July he received a call from the contractor who said that a working teamster foreman was demanding a day's pay for one of the Union's members because a truck owned by a New Jersey supplier of concrete forms was being driven by New Jersey teamsters, Apart from the fact that this testimony is hearsay, King further testified that, when he called Union Agent James Jeswaldi, the latter said that the working teamsters foreman had made a mistake and that the claim for a day's pay was invalid.

Finally, the General Counsel offered into evidence a series of claim forms that had been presented to Schiavone Construction Company over a period of time by Working Teamsters Foreman Joe Cammarano. Basically, there are claims by Cammarano for a day's pay to be given to a member of the Union when it was asserted that a Local 282 member had lost work because a driver of a delivery truck was not a teamster. All of these claims were made, however, outside the 10(b) statute of limitations period. As to the claims, Gennaro Liguori, a project manager for Schiavone, testified that in most cases he simply paid the claims because he back charged the suppliers and therefore it did not cost Schiavone anything to comply with Cammarano's claims.[12] He further testified that on several occasions he refused to pay the claims and that on those occasions the Union never followed up or pressed the claims. In this respect, he conceded that at no time did any union official threaten to take any action of any kind in relation to these claims. John Cody testified that claims of this type would not be permitted and would be disallowed.

VI. ANALYSIS

A. *The 8(b)(7)(C) Allegation*

Insofar as is relevant to this proceeding, Section 8(b)(7)(C) of the Act makes it unlawful for a labor organization:

> (7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:
>
> * * * * *
>
> (C) where such picketing has been conducted without a petition under section 9(c) being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing.

In the context of this case, the issues are: (1) whether the Union either threatened to picket or engaged in picketing;[13] (2) whether, if picketing were conducted, was the Union responsible for such conduct; (3) whether an object of the picketing was for an initial recognitional object; and (4) whether such picketing was conducted for more than a reasonable period of time in the absence of a petition for an election being filed pursuant to Section 9(c) of the Act.

In defining what activity constitutes picketing, Justice Douglas stated in a concurring opinion in *Bakery & Pastry Drivers & Helpers, Local 802 International Brotherhood of Teamsters* v. *Wohl*, 315 U.S. 769, 776 (1942):

> Picketing by an organized group is more than free speech since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being dis-

[12] It could be argued that this arrangement was simply an indirect means by which the Union enforced its contracts with suppliers who breached their contracts with the Union inasmuch as they, and not Schiavone, bore the expense.

[13] There is no evidence that, prior to May 21, the Union threatened to picket, although there is evidence of threatened strikes.

seminated. Hence those aspects of picketing make it the subject of restrictive regulation.[14]

In *Lumber and Sawmill Workers Local Union No. 2795 (Stolze Land & Lumber Company)*, 156 NLRB 388 (1965), the issue was whether the Union engaged in picketing within the meaning of Section 8(b)(7). In that case, the union had discontinued using placards but instead posted its members at the entrance of the company's premises who distributed handbills to employees and customers, protesting the company's nonunion status and failure to meet union standards. The Administrative Law Judge, in an opinion adopted by the Board, stated (p. 394):

> Although the objectives of the Union after April 6, 1965, remained the same as before, it is the Union's position that it was not, after that date, picketing. Picketing, or causing to be picketed, or a threat thereof, is a vital element in a violation of Section 8(b)(7) of the Act. The principal question remaining is, therefore, whether or not the Union's handbilling activity after April 6, 1965, was, in fact, picketing. Black's Law Dictionary defines "pickets" as "A relay of guards in front of a factory or place of business of an employer for the purpose of watching who enters or leaves it, or the establishment and maintenance of an organized espionage upon the works and upon those going to and from them." In Bouvier's Law Dictionary is found, under "Picketing": "Picketing by members of a trade union or strikers, consists in posting members at all approaches to the works struck against for the purpose of reporting the workman going to or coming from the works; and to use such influence as may be in their power to prevent the workman from accepting work there. "It will be noticed that neither definition mentions the use of the placard on a stick which is so familiar as an emblem of pickets. In *N.L.R.B.* v. *Local 182, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Woodward Motors)*, 314 F.2d 53 (C.A. 2), the court quoted Webster's New International Dictionary (2d ed.) as defining the verb "picket" as meaning "to walk or stand in front of a place of employment as a picket" and the noun as "a person posted by a labor organization at an approach to the place of work. . . ." By none of these definitions is the patrolling or the carrying of placecards a concomitant element. The important feature of picketing appears to be the posting by a labor organization or by strikers of individuals at the approach to a place of business to accomplish a purpose which advances the cause of the union, such as keeping employees away from work or keeping customers away from the employer's business. In this sense, what the Union was doing after April 6, 1965, was just as much picketing as what it was doing when it carried signs. I have already concluded that the Union here was more concerned with keeping employees away from work and keeping customers from dealing with the Company than it was in advancing area standards by informing the public of the fact that the Company was nonunion, and I find that its purpose in posting its members in front of the office to confront both customers and employees or prospective employees rather than the public passing on the highway was to advance its 1-1/2-year-old dispute with the Company and was, therefore, picketing.

The Board in the above-noted case, and the court in *N.L.R.B.* v. *Local 182, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America* [*Woodward Motors*], 314 F.2d 53 (1963),[15] held that unions had engaged in picketing despite the fact that the picketing did not adhere to traditional practices. However, the Board in *Teamsters Local Union No. 688 (Levitz Furniture Company of Missouri, Inc.)*, 205 NLRB 1131 (1973), concluded that leafleting activity did not constitute picketing in the circumstances of that case. The Board stated at 1132–33:

> There is no contention and no evidence that any individuals acting on behalf of Respondent patrolled with signs at Levitz. There is only evidence that Respondent's agents were regularly present at the entrances to Levitz' parking lot for over 4 months; that they offered handbills to all who entered the premises during this period; that they engaged in some conversations with certain Levitz officials in which they described their activity as "picketing"; that on some occasions they conversed with Levitz employees; and that one truckdriver turned away and did not make a scheduled delivery to Levitz. The Charging Party and General Counsel argue that these facts taken as a whole establish that Respondent's handbilling was intended to and did have substantially the same significance for persons entering the premises as a traditional picket line.
>
> We recognize, of course, that there may be situations where, even though union agents do not patrol with signs, their very presence is intended to and does operate as a signal to induce action by those to whom the signal is given. It is this "signalling" which provokes responses without inquiry into the ideas being disseminated and distinguishes picketing from other forms of communication and makes it subject to restrictive regulation.

[14] This definition of picketing has been adopted by the Board. See *District 1199, National Union of Hospital and Health Care Employees, RWDSU, AFL-CIO (United Hospitals of Newark)*, 232 NLRB 443 (1977).

[15] In *N.L.R.B.* v. *Local 182, IBT, supra*, cars were parked on the shoulder of a highway adjacent to the plant and picket signs were placed in a snow bank. The evidence in that case also established that union representatives occasionally got out of their cars to stop deliverymen from coming onto the premises. The court stated:

> Webster's new International Dictionary (2d Ed.) says that the verb "picket" in the labor sense means "to walk or stand in front of a place of employment as a picket" and that the noun means "a person posted by a labor organization at an approach to the place of work. Movement is thus not requisite, although here there was some. The activity was none the less picketing because the Union chose to bisect it, placing the material elements in snow banks but protecting the human elements . . . by giving them comfort of heated cars.

The question we must therefore answer is whether Respondent's proven conduct justifies finding that Respondent was not merely engaged in communicating the information set out in its handbills, but was actually seeking in distributing such handbills to convey a "signal" to induce those confronted by its agents to take the kind of action which traditional picket lines are expected to evoke. Such a conclusion is unwarranted on the facts of this case.

We can hardly presume from one isolated instance when a delivery was not made that Respondent intended its conduct to be perceived by those approaching Levitz as a picket line. We do not know what prompted this driver to conclude, if he did so, that he was facing a picket line in the persons of the handbillers. There is no evidence that anything was said by them or any "signal" was given to him when he was approached by the handbillers. As reflected by the record evidence, nothing more than the usual handbilling procedure was followed in regard to this incident. Accordingly, we are unpersuaded that this stoppage is sufficient to prove that the handbilling was a subterfuge for picketing.

Nor can we say, in light of all the evidence, that it would be reasonable for anyone approaching Levitz' premises to conclude that picketing rather than handbilling was being conducted. Moreover, if the criterion to establish that handbilling amounted to picketing is impact on deliveries then there was no picketing because deliveries were essentially unaffected. And while it is true that some of the handbillers, in response to questions from representatives of Levitz, used the term "informational picketing" to describe their activity, the mere utterance of that word, in circumstances that show no "signal" was intended thereby, cannot transform mere handbilling into picketing.

Apart from the question herein as to whether the activities on May 21, 22, and 23 were attributable to Respondent, the foundation question as to whether such activity constituted picketing must be answered affirmatively in order for the General Counsel to establish the 8(b)(7)(C) violation. In sum, it seems to me that the instruction of the case law is that the absence of placards (picket signs) and the absence of physical movement by people are not necessary to a finding that an activity constitutes picketing, so long as the activity conveys a "signal" to induce people not to cross and enter an employer's facility. While the facts of each case may warrant different conclusions, it seems to me that on the facts of the instant case I must reject Respondent's contention that no picketing was conducted on May 21, 22, and 23.

Although it is clear that no picket signs were utilized on the days in question, it also is clear that pursuant to a preconceived plan, working teamster foremen along with other members of the Union stationed themselves at the delivery entrances to construction sites. It also is established and Working Teamsters Foreman Lypen conceded that he approached trucks making deliveries to his site for the purpose of explaining that the Teamsters were engaged in a job action and the reasons for the job action. The credible testimony of Herman Klouse was that deliveries which were scheduled for delivery to the Red Hook jobsite on those days were not made and that Lypen told him on May 21 that he was not allowing deliveries to be made.

The evidence is also persuasive that a substantial portion of the scheduled deliveries were not received at jobsites operated by R. T. Sewer, Slattery, Steers, Spearing & Buckley, and Schiavone. Here too the testimony of Lypen establishes that the work stoppages were planned by a group of the working teamsters foremen and that men were stationed at delivery entrances for the purpose of getting the story across to drivers of trucks making deliveries to the respective construction sites. Thus, at the Slattery jobsite, Donald O'Hare testified, without contradiction, that on May 21, after two truckdrivers did not make a scheduled delivery, Working Teamsters Foreman Fornabia told him that "we can't accept deliveries on this job today."

In light of the above, it is my opinion that the actions of the working teamsters foremen on May 21, 22, and 23 conveyed a "signal" to the drivers of trucks making deliveries to construction sites to refuse to make such deliveries and thereby constituted picketing within the meaning of Section 8(b)(7).[16]

The next issue is whether the Union is legally responsible for the action of the working teamsters foremen. In this respect, Respondent asserts that the Union is not responsible for, what in effect, was a "wildcat" action by these men.

Initially, it is concluded that despite the title of working teamsters foremen, the people holding these positions perform the functions of traditional shop stewards. Thus, the collective-bargaining agreement between the Union and the GCA is explicit in investing this category of employee with the right and authority to administer the collective-bargaining agreement on behalf of the Union. Indeed O'Connor, Respondent's counsel agreement on behalf of the Union, conceded at the hearing that working teamsters foremen are agents of the Union, asserting, however, that as to the events of May 21, 22, and 23 they were not acting within the scope of their agency.

Section 2(13) of the Act, which defines the term "agent" provides:

> (13) In determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the *specific acts performed were actually authorized* or subsequently ratified *shall not be controlling*. [Emphasis supplied.]

[16] As most drivers of trucks making deliveries to the construction sites would be members of or represented by the Union or affiliated unions, and as the people stationed at delivery gates were often working teamsters foremen who are agents of the Union, it is reasonable to conclude that drivers would be reluctant to go into these sites to make deliveries which is what happened here.

As Senator Taft, one of the sponsors of the Act, explained:

> Consequently, when a supervisor acting in his capacity as such, engages in intimidating conduct or illegal action with respect to employees or labor organizers his conduct can be imputed to his employer regardless of whether or not the company official (s) approve or were even aware of his actions. Similarly union business agents or stewards, acting in their capacity of union officers, may make their union guilty or an unfair labor practice in the bill, even though no formal action has been taken by the union to authorize or approve such conduct. [93 Cong. Rec. 7001.]

The Board, in defining agency has held that Section 2(13) of the Act constitutes an adoption of the common law rules of agency, and has quoted from the Restatement on Agency as follows:

> A principal may be responsible for the act of his agent within the scope of the agent's general authority, or the "scope of his employment" if the agent is a servant, even though the principal has not specifically authorized or indeed may have specifically forbidden the act in question. It is enough if the principal actually empowered the agent to represent him in the general area within which the agent acted.[17]

In cases where the actions of a union shop steward were in issue, the Board has with substantial uniformity held that a union is liable for the actions of such agents.[18] Indeed in one of the cases cited by Respondent, namely, *Local 2346, United Brotherhood of Carpenters and Joiners of America, AFL-CIO (Erectors Inc.)*, 156 NLRB 1105 (1966), the Board adopted the Trial Examiner's conclusion that a union was responsible for the actions of its appointed shop steward. In this respect the Trial Examiner stated at 1109:

> While the record contains no evidence as to the nature of Corley's duties as steward or the scope of his authority, in light of the fact that it is the custom of stewards to represent labor organizations which they serve in the enforcement of union policy, and in the absence of any evidence to show that Corley's authority was limited or that his conduct was contrary to union policy, I conclude that in engaging in the conduct alleged to violate Section 8(b)(4) in this case, both Stapp and Corley were acting as agents of the District Council to whom their conduct is attributable.[19]

In the instant case, Respondent contends that the actions of the working teamsters foremen were acting in an unauthorized manner and that the Union should not be held liable for their actions. I do not agree. The evidence in this case establishes that the Union by its president, John Cody, and by various of its other elected officials made demands as early as May 8 on both GCA and the BCA for the hiring of additional people to stand alert at construction sites. Further, there in evidence of a series of strikes engaged in by members of the Union against BCA members which resulted in the execution of agreements between the Union and members of the BCA in relation to the Union's demands. Between May 8 and 21, the elected officials of the Union continually reiterated their demands and the work stoppages instigated by the working teamsters foremen on May 21 were clearly in furtherance of such demands. Indeed, after the work stoppages ended as a result of the consent injunction issued by the Federal district court, on May 23, the Union persisted in its demands and the issue giving rise to the strikes has been submitted for arbitration. Clearly, the actions of the working teamsters foremen were at all times consistent with and in furtherance of the Union's stated objectives. It therefore seems to me that this unity of purpose is compelling evidence of Respondent's responsibility for the acts of people who concededly are its agents.

The Union nevertheless argues that it dispatched business agents to halt the work stoppages and to order the men back to work. Yet the evidence on this score which shows that two business agents were sent out on May 22 to order the men back to work also establishes a decided lack of effort on the Union's part. Thus, Business Agent Matarazzo testified that on May 22 he visited two jobsites, ordered the men to return to work, and when faced with their refusals merely said "okay," got in his car, and left. He did not even attempt to order the men at the Schiavone site to go back to work because, as he put it, he did not see the men at the site and in any event decided it would be a fruitless effort in light of his visits to the two other sites. No one from the Union told the working teamsters foremen that they would be subject to union sanction if they continued the strikes or that as appointed agents they could be removed from their offices.

In light of the above, it is concluded and I find that the concerted strike and picketing activities led by the working teamsters foremen on May 21, 22, and 23 were attributable to the Union.

We next turn to the question of whether the Union's picketing was for an initial recognitional object, for if it was not, then the 8(b)(7)(C) allegation must be dismissed.[20] Since the Union is currently the recognized

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[17] *International Longshoremen's and Warehousemen's Union, CIO (Sunset Line and Twine Company)*, 79 NLRB 1487, 1590 (1948).

[18] See, e.g., *United Brotherhood of Carpenters & Joiners of America, Local Union No. 2067, AFL-CIO (Associated General Contractors of America Inc.)*, 166 NLRB 532 (1967), and cases cited therein at pp. 539 and 540. See also *Laborers and Hod Carriers Local No. 341 (Bannister-Joyce-Leonard)*, 232 NLRB 917, 919 (1978). For a contrary result see *Plumbers Local 83 (Power City Plumbing & Heating)*, 228 NLRB 216 (1977), reversed and remanded 571 F 2d 1292 (4th Cir. 1978).

[19] The Trial Examiner in the case held, however, that neither was an agent of Local 2346 because the evidence failed to establish that they were acting on behalf of that organization.

[20] *Local Lodge 790, International Association of Machinists (Frank Wheatley Pump and Valve Manufacturer)*, 150 NLRB 565 (1964); *Warehouse Employees Union, Local No. 570 (Whitaker Paper Company)*, 149

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bargaining agent for a unit of truckdrivers employed by the members of the GCA and since its demand is for the hire of additional employees to be encompassed within that unit, there is, therefore, a substantial question as to whether an object of the picketing was for initial recognition.

In support of her theory that initial recognition is being sought, the General Counsel states in her brief:

> The evidence demonstrates Respondent Local 282 demanded its members be hired as guards by GCA employer-members even though Local 282 is currently recognized as the collective bargaining representative of only the employers' drivers and even though no valid petition under Section 9(c) of the Act had been or could have been filed. This demand is in essence a demand for a closed shop, for expansion of the currently recognized bargaining unit and for a bargaining unit composed of both guards and nonguards. The picketing in support of this demand is for an objective proscribed by Section 8(b)(7)(C).
>
> The demand that Local 282 members be hired as guards in the circumstances of this case is a demand with a recognitional objective where Local 282 is ineligible to be certified as the collective bargaining representative under Section 9(b)(3) of the Act because it would then be in the position of admitting both guard and nonguard employees to membership. Section 8(b)(7)(C) proscribes picketing or threats to picket where a union cannot be certified as the collective bargaining representative because it admits both guards and nonguards into membership. *General Service Employees Local 73 (A-1 Security Service Company)*, 224 NLRB 434 (1976). Regardless of the duration of the picketing in these circumstances, Section 8(b)(7)(C) is violated. *Local 71, IBT (Wells Fargo Armored Service Corp.)*, 221 NLRB 1240 (1975); *Local 639, IBT (Dunbar Armored Express)*, 211 NLRB 687 (1974). It is also irrelevant that the jobs for which the recognitional picketing occurred have not yet been filled. The Board has held that the proscriptions of Section 8(b)(7)(C) are applicable to future employees. *Lively Construction Co.*, 170 NLRB 1499 (1968); *Local 445, IBT (Edward L. Nezelek, Inc.)*, 194 NLRB 579 (1971).

In the amicus brief filed by the Construction Users Council, a somewhat broader approach is taken. They state:

> The Board has held, with Third Circuit approval, that this prohibition applies—as it should here—to situations in which a recognitional and bargaining demand is made on behalf of employees who have not been hired and who the employer has no intention of hiring. Thus, regardless of their technical status as guards or non-guards, Local 282's picketing to force the GCA to recognize it as the bargaining representative for the two Local 282 members it wanted employed at each site is plainly illegal.[21]

As to whether the Union's demand contemplated the hiring of guards,[22] Section 9(b)(3) of the Act defines a guard as an individual employed to "enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises." In discussing the purpose served by this section of the Act, the Board in *McDonnell Aircraft Corp.*, 109 NLRB 967 (1954), stated in a case involving firemen at 969:

> Moreover, it is apparent from the legislative history of the Act that, by requiring guards to be isolated from other employees in collective bargaining, Congress intended to insure to an employer that during strikes or labor unrest among his other employees, he would have a core of plant protection employees who could enforce the employer's rules for protection of his property and persons thereon without being confronted with a division of loyalty between the Employer and dissatisfied fellow union members. The rules enforced by the firemen are primarily directed toward preservation of safety during normal plant operations, and are not related to circumstances in which Congress felt conflicting loyalties might exist. Accordingly, we do not believe that Congress intended that the enforcement duties of the firemen should be treated as guard duties under the Act. In view of these factors, we find that the firemen are not guards within the meaning of Section 9(b)(3) of the Act.

Also the Board in *Walterboro Manufacturing Corporation*, 106 NLRB 1383, 1384 (1953), defined the intent of Congress as follows:

> The legislative history demonstrates that Congress was concerned with the possibility that if guards were included in production units their loyalty to fellow union members might conflict with their duty to report to their employer derelictions of duty or violations of rules by employees.

Subsequently the Board has cited with approval its opinion in *McDonnell Aircraft Corp, supra*, in *Lion County Safari*, 225 NLRB 969 (1976), regarding the statutory purpose,[23] although in *United Technologies Corporation,*

NLRB 731 (1964); *Building and Construction Trades Council of Santa Barbara County, AFL-CIO (Sullivan Electric Company)*, 146 NLRB 1086 (1964).

[21] In support of this proposition, they cite *N.L.R.B.* v. *Local 542, International Union of Operating Engineers, AFL-CIO* [*R. S. Noonan, Inc.*], 331 F.2d 99 (3d Cir. 1964); *Los Angeles Building and Construction Trades Council (Lively Construction Company)*, 170 NLRB 1499, 1503 (1968); *Local 445, IBT (Edward L. Nezelek, Inc.)*, 194 NLRB 579, 584 (1971), affd. 473 F.2d 249 (2d Cir. 1973).

[22] In connection with Sec. 9(b)(3) of the Act, the Board has held that a unit composed of statutory guards and nonguards is inappropriate for purposes of collective bargaining. *American District Telegraph Company*, 84 NLRB 102 (1949); *Radio Corporation of America*, 173 NLRB 440 (1968).

[23] In that case the Board, in discussing gate men and tower observers at a wild life and amusement park, stated:

> It is apparent from the legislative history that the separation of guards and other employees for the purpose of union representation

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Chemical Systems Division, 245 NLRB 932 (1979), the Board concluded that the firemen involved there were statutory guards. However, in the latter case the firemen, unlike those in *McDonnell Aircraft*, were responsible for enforcement of all company rules: two were deputy sheriffs having responsibilities for law enforcement and could carry firearms. Moreover, the evidence in that case established that all firemen were promoted from the ranks of the company's guards and were under a common line of supervision.[24]

Given the legislative history of Section 9(b)(3) which seeks to prevent a conflict of interest between guards and nonguard employees, it appears that the use of the word "rules" in the statutory definition has a significant meaning. Thus, a common theme in the Board decisions is that for an employee to be defined as a guard he must be authorized to enforce or at least report breaches of company rules against employees and other persons where such rules are for the protection of the company's property or to protect the safety of persons on its premises.[25] Thus, it does not appear to be enough that an individual perform functions which in some way protects property or persons. It is the function of enforcing company rules against employees and other persons which gives rise to the potential conflict of interest which Congress sought to prevent. While it may not be necessary for such rules to be reduced to writing or even spelled out in a detailed manner, it nevertheless seems that the evidence must show the existence of company rules which the person in question is authorized to deal with either directly or indirectly.

In the instant case, the Union made a demand on the GCA that its members hire for each construction site two people who would be stationed at the gates, who would have walkie-talkies and who would close the gates and alert the other employees on the site in the event that marauding gangs appeared and attempted to enter the site. It also is apparent that the GCA opposed this scheme, likening it to vigilante action which it felt would serve to worsen rather than alleviate the problem. The parties quickly reached an impasse on this subject matter so that the details of the duties to be performed were never spelled out. To the extent that a precedent exists for these jobs, the testimony reveals that, at a job operated by a BCA employer, the functions of the additional employee hired were determined by the working teamsters foreman, the Union's business agent, and the employee without any input by the employer. Thus, in that instance, the employer did not define the employee's role in any way. Moreover, there is no evidence that it was the Union's intention to invest these employees with the powers to carry guns, to arrest people, or to carry out company rules against anyone. Nor is there evidence that the Union wanted these men to be deputized or to wear uniforms. Indeed, in the Union's plan, the employees would not even be empowered to prevent access of all unauthorized visitors, but only to prevent access to the community groups discussed. It may be that what the Union contemplated was, in essence, a self-help or vigilante type of solution to the problem with a concomitant increase of employment for the people it represents. But in so doing, it would appear that the intent of the Union was not to have these additional employees enforce company rules to protect property or persons. Rather, it appears that the Union contemplated that these people carry out the Union's plan to protect its own members and the other tradesmen working on construction sites. As such, it seems to me that the General Counsel has failed to prove that the Union sought to create a classification of employees to be hired who would fall within the statutory definition of guards.

Notwithstanding my conclusion that the people in question would not be guards within the meaning of Section 9(b)(3), this does not end the inquiry. It still is apparent that the people which the Union sought to have hired would constitute a new classification of employees and perform functions not contemplated by the parties when they entered into their collective-bargaining agreement. It therefore is my opinion that, although the Union is currently recognized as the collective-bargaining representative within a unit of truckdrivers, it is not recognized as the representative of this proposed new classification of employees whose job functions, to the extent they would exist, would only be remotely related to the duties of the existing bargaining unit employees. Accordingly, as to the proposed new class of employees, it is concluded that the Union did have a recognitional object because it sought to compel the employer-members of the GCA to hire such employees and to represent them under a collective-bargaining agreement. *N.L.R.B.* v. *Local 542, International Union of Operating Engineers*, 331 F.2d 99 (3d Cir. 1964); *Los Angeles Building and Construction Trades Council (Lively Construction Company)*, 170 NLRB 1499 (1968); *Local 445, IBT (Edward L. Nezelek, Inc.)*, 194 NLRB 579 (1971), affd. 473 F.2d 249 (2d Cir. 1973). In effect, the Union herein is seeking to compel these employers, who are engaged in the construction industry, to enter into 8(f) agreements[26] cover-

was intended to avoid conflicting loyalties and to insure an employer that he could have a core of plant protection employees, during a period of industrial unrest and strikes.

In concluding that the people in dispute were not statutory guards, the Board noted that they did not enforce rules against employees, that they had limited contact with customers insofar as the enforcement of the employer's rules, that they wore the same uniform as other employees, that they were not deputized nor armed, that they did not interchange with the rangers who actually enforced the rules, and that the employer engaged a private security agency to provide security when the park was closed.

[24] See also *Reynolds Metal Company*, 198 NLRB 120 (1972). Cf. *United States Gypsum Co.*, 152 NLRB 624 (1965), where the Board held, in the circumstances of that case, that firemen-watchmen were not guards as they did not, *inter alia*, have any responsibility for enforcing plant rules or reporting breaches of such rules. Cf. *Sears, Roebuck & Company*, 157 NLRB 32 (1966), and *Shattuck School*, 189 NLRB 886 (1971), where employees were found not to be guards because they were not responsible for the enforcement of company rules to protect property or safety.

[25] It need not be his own company's rules. See *Brink's Incorporated*, 226 NLRB 1182 (1976); *The Wackenhut Corporation*, 196 NLRB 278 (1971).

[26] Sec. 8(f) states:

It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the

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ing this new class of employees, an object which has been defined as recognitional in nature by the Board and the Courts. *N.L.R.B.* v. *Iron Workers Local 103 [Higdon Contracting Co.]*, 434 U.S. 335 (1978); *Local 86, Brotherhood of Painters, Decorators and Paper Hangers of America (Carpet Control Inc.)*, 216 NLRB 1127 (1976).[27]

It still remains to be seen whether the Union's picketing violated Section 8(b)(7) because it is agreed that the picketing was conducted for only 3 days. (It is conceded that no election petition was filed by any party.) Thus, Respondent would argue that, even if the picketing did have a recognitional object, it did not picket for more than a reasonable period of time without the filing of a petition for an election. The General Counsel points out that, if the employees in question were construed as guards, the Union would thereby admit guards and nonguards to membership and accordingly would be ineligible for certification because of the provisions of Section 9(b)(3). The General Counsel correctly points out that, in such a situation, where a petition for an election cannot be processed, the Board has held that recognitional picketing will violate the Act from its inception. *General Service Employees Local 73 (A-1 Security Service Company)*, 224 NLRB 434 (1976), affd. 578 F.2d 361 (1978); *Drivers, Chauffeurs, Warehousemen and Helpers, Local Union No. 71 (Wells Fargo Armored Services Corporation)*, 221 NLRB 1240 (1975), affd. 553 F.2d 1368 (D.C. Cir. 1977). Essentially, this result derives from the relationship of Section 8(b)(7)(C) and Section 9(c) of the Act. Thus, pursuant to Section 8(b)(7)(C) recognitional picketing is allowed for a reasonable period of time not to exceed 30 days where no election petition has been filed under Section 9(c). It therefore is apparent that Congress intended to permit such picketing to be conducted for only a limited duration after which a petition must be filed so as to permit the employees to vote on whether they desire union representation. However, where an election petition cannot be processed, to permit a union to escape the strictures of Section 8(b)(7)(C) because of its own disqualification from participating in an election would defeat the purpose of the statute and would permit such a union to engage in recognitional picketing in perpetuity. As no election petition can be filed in such cases, the Board has held that such picketing, for any length of time, is unreasonable.

The instant case is directly analogous to the above situation in my opinion. Where, as here, recognition is sought for employees who are not currently employed and for whom the employer neither has a need, desire, nor intention to employ, it is hard to imagine how a petition for an election would be processed. After all, who would vote? In *N.L.R.B.* v. *Local 542, International Union of Operating Engineers, AFL-CIO [R. S. Noonan, Inc.]*, 331 F.2d 99 (3d Cir. 1964), the court stated at 104-107:

> The Union argues, nonetheless, that its picketing was proper. It points to Sections 8(b)(7)(C) and 9(c) of the National Labor Relations Act which, among other things, validate recognitional or bargaining picketing when a representational petition is filed with the Board within a reasonable period of time not to exceed thirty days after the commencement of the picketing. Specifically, the Union contends that the Employer's filing of a representational petition on May 16, 1962, in response to the picketing which commenced on May 1, 1962, fulfilled this requirement.
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> Section 8(b)(7)(C) also provides that if an appropriate petition has been filed, the Board shall forthwith "direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof." Putting to one side that the Employer withdrew the petition on June 12, 1962, with the approval of the Board's Regional Director, it is still apparent this petition was inoperative as a basis for an election.
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> In the instant case the picketing commenced May 1, 1962, while the Employer had not used operating engineers since 1957. There was, at the time of the picketing, no nucleus of regular operating engineer employees that could have voted in a representational election.
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> * * * * *
>
> The Union takes issue with the conclusion that an election must be feasible before the representational petition could be deemed operative, because this ignores, it asserts, the peculiar circumstances of the construction business, involved herein. In this industry the employer hires workers not on a normal yearly basis but on an irregular job basis. If no construction workers were being employed on or about

building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 9 of this Act prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: *Provided*, That nothing in this subsection shall set aside the final proviso to section 8(a)(3) of this Act: *Provided further*, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 9(c) or 9(e).

[27] Respondent's contention that the potential cause of the work stoppages was due to unsafe conditions is rejected. For one thing, even if the picketing were motivated by such a consideration, it is sufficient for the purposes of Sec. 8(b)(7)(C) that an object of the picketing be recognitional as well. *Dayton Typographical Union No. 57 [The Greenfield Printing Publishing Co.]* v. *N.L.R.B.*, 326 F.2d 634 (D.C. Cir. 1963); *Local 445, IBT (Colonial Carriers, Inc.)*, 145 NLRB 263 (1963). Nor can I agree that the strike or picketing was privileged under Sec. 502 of the Act. In this respect the only evidence of a physical injury arising from a confrontation with a community group occurred on May 6 and involved a member of a different union. The safety complaints expressed herein are in no way related to job functions or duties performed by Teamsters and are not, in my opinion, the result of any conditions inherent at the workplace. Moreover, there is no indication that as of May 21 when the strike commenced that there was any imminence of a confrontation or injury.

the time of the filing of a representational petition, elections may be impossible, the Union reasons. It thus suggests that making the election requirement of Section 8(b)(7)(C) applicable to picketing in the construction industry will preclude picketing that will bring about recognition for the purpose of concluding pre-hire agreements.

Congress in Section 8(f) of the National Labor Relations Act has given its sanction to the voluntary negotiation of pre-hire agreements in the construction trade, though no employees may be working in the particular craft unit and the majority status of the union cannot be established. But it is quite another matter to permit picketing of a construction industry employer under the instant circumstances.

* * * * *

To allow picketing in this case by disregarding the election requirements would be improper. This would license a Union's use of coercion upon an employer to sign a pre-hire agreement, where the majority status of the union could not be established by an election. Congress has not gone so far as to permit picketing to compel execution of a pre-hire agreement in these circumstances.

* * * * *

[I]f there were no current employees and only a possibility of prospective employees, the Union's recognitional picketing would be unaffected by any requirement of filing a petition with the Board, if we accept the construction that the statute applies only to current employees. It then could picket, presumably, *ad infinitum*. Such a construction would be an unreasonable interpretation of the Act.

In sum, where as here, an election petition could not be processed because of the nonexistence of a voting unit, it makes little sense to permit recognitional picketing to continue for any time after its commencement since there is no Board mechanism for resolving the question concerning representation. I therefore find and conclude that by engaging in recognitional picketing on May 21, 22, and 23, the Union violated Section 8(b)(7)(C) of the Act.[28]

B. *The Alleged 8(b)(3) Violation*

Section 8(b)(3) of the Act imposes on unions the concomitant obligation to bargain in good faith that Section 8(a)(5) imposes on employers. Section 8(d) of the Act, in pertinent part, provides that, where there is in effect a collective-bargaining agreement, the duty to bargain shall mean that neither party to such contract "shall terminate or modify such contract, unless the party desiring such termination or modification" gives written notice to the other side of such desire 60 days prior to the contract's expiration date, offers to meet and confer with the other party, notifies the Federal Mediation and Conciliation Service and any similar state or territorial agency within 30 days, and "continue[s] in full force and effect, without resorting to strike or lock out, all the terms and conditions of the existing contract for a period of sixty days after such notice or until the expiration date of such contract, whichever occurs later."

In the instant case, it is agreed that the unit of employees covered by the current collective-bargaining agreement consists of truckdrivers. I have previously concluded that the Union's demands herein were designed to effectuate an expansion of the existing bargaining unit by adding a new class of employees. As such, it is self-evident that the Union was seeking to alter or modify the existing terms of the collective-bargaining agreement during its duration. It also is established that, in seeking this midterm modification, the Union engaged in a strike during the life of the contract to compel the employers over their opposition to meet the Union's demands. Finally it is established that to the extent bargaining was conducted on this issue, before and after the strike, the Union was as adament in its demands as the GCA was adament in opposing the demands. Indeed, when no agreement was possible, the disputed issue was referred to arbitration. Accordingly, I find that an impasse had been reached on this subject matter.

In view of the foregoing, I conclude that, by insisting to impasse and by engaging in a strike to alter or modify the terms of the existing collective-bargaining agreement to include a class of employees not covered by such agreement, the Union has violated Section 8(b)(3) of the Act.[29]

C. *The Alleged Violations of Section 8(b)(1)(A) and (2)*

Counsel for the General Counsel contends that the Union demanded that members of the Union be the only persons hired to fill the additional jobs. As such, she contends that this constitutes a demand for a closed-shop agreement designed to preclude nonmembers from obtaining these, *in futuro*, jobs. In support of this contention, counsel for the General Counsel seemingly relies on statements by Cody that he wanted "282 men to protect 282 men" and the fact that certain employees hired by BCA members were already members of the Union at the time of their hire.

The evidence with respect to these allegations does not establish that either Cody or any other agent of the Union said to any employer or the GCA that, if the jobs were created, they could not hire new employees who were not union members. Nor does the evidence establish that, at the jobsites of the BCA employers where

[28] As the issue of whether the Union's picketing is violative of Sec. 8(b)(7)(C) is not before the arbitrator, as it involves a statutory issue and an issue regarding a question concerning representation, I conclude that it would be inappropriate to defer this matter to arbitration as the Union suggests. *Brewery Delivery Employees Local Union 46, IBT (Port Distributing Corp.)*, 236 NLRB 1175 (1978); *Germantown Development Co.*, 207 NLRB 586 (1973); *Combustion Engineering*, 195 NLRB 909 (1972).

[29] See *IBEW Local 6 (Ohio Power Co.)*, 203 NLRB 230 (1973); *Local 164, Brotherhood of Painters, Decorators and Paperhangers of America, AFL-CIO, et al. (A. D. Chetham Painting Company)*, 126 NLRB 997 (1960), affd. 293 F.2d 133 (D.C. Cir. 1961), cert. denied 368 U.S. 824; *Smith Steel Workers* v. *A. D. Smith*, 420 F.2d 1 (7th Cir. 1969).

Local 282 members were employed, any nonunion individual either sought or was denied employment. The collective-bargaining agreement between the GCA and the Union has a union-security provision requiring continued membership of those employees who already are members and membership by new employees after their 30th day of employment or 30 days after the contract's execution, whichever occurs last. There is no evidence that the Union made any demand to modify this provision of the contract and the agreement signed by certain of the BCA members which was proferred to the GCA does not purport to modify the union-security provision. Additionally, the evidence establishes that the Union does not operate a hiring hall for job referrals or maintain a seniority system for construction job hiring. Therefore, it does not operate a discriminatory hiring hall or seniority system. Although it is true that, as to the BCA jobsites, union members were referred, apparently with the consent of those employers, there is no evidence that the employers there attempted to hire nonunion members or that nonmembers applied for and were refused jobs.

Cody testified that, insofar as the new jobs were concerned, he wanted the people hired to be covered by his contract and therefore become members of his Union so that they would have a sense of loyalty to his members working at the construction sites. He therefore denied that it was his intention to modify the union-security clause in the contract so as to require union membership as a condition of being hired.

It is my opinion that the General Counsel's evidence fails to warrant the conclusion that the Union made a demand for a closed shop insofar as the new classification of employees which the Union proposed to be hired. In negotiations, especially in circumstances where the parties are well known to each other, it is common for shortcut expressions to be used. If Cody said, "I want 282 men to protect 282 men," this does not, of necessity, translate into union membership as a condition of hire. It is just as reasonable, indeed more so, to conclude that his meaning was that he wanted men represented by Local 282 to protect employees who were members of or represented by Local 282. To construe this language as constituting a demand for a closed shop, contrary to the express provisions of the existing collective-bargaining agreement, would mean that, under the General Counsel's theory, in order to avoid liability, Cody would have been required to state, "I demand that the people I want you to hire to protect employees represented by my Union, retain their membership in the Union if they already are members, or if not members, acquire membership after they are employed for 30 days or 30 days after the contract was executed, whichever occurs last." To require such a statement in the rough and tumble course of negotiations is, in my opinion, unreasonable (and unduly lengthy), and does not take into account the realities of the circumstances.

In view of the above, I reject the contention that the Union violated Section 8(b)(1)(A) and (2) in the manner alleged by the General Counsel.[30] For the same reasons, I reject the Charging Party's argument that the demand was one designed to discriminate against the hiring of minorities.

D. *The 8(b)(4)(ii)(A) Allegation*

As noted above, in order to establish this violation, the General Counsel must prove that the Union "threatened, coerced, or restrained any person" where an object of such conduct was to force them to enter into an agreement prohibited by Section 8(e) of the Act. The initial problem therefore is to determine the definition of the words "contract" or "agreement" within the meaning of Section 8(e).

Section 8(e) was enacted to close one of the loopholes which existed in the secondary boycott provisions of the Act, which were then designated as Section 8(b)(4)(A). The Supreme Court in *National Woodwork Manufacturers Association, et al.* v. *N.L.R.B.*, 386 U.S. 612 (1967), described the purpose of Section 8(e) at 634 as follows:

> In *Local 1976, United Brotherhood of Carpenters* v. *Labor Board (Sand Door)*, 357 U.S. 93, the Court held that it was no defense to an unfair labor practice charge under § 8(b)(4)(A) that the struck employer had agreed, in a contract with the union, not to handle nonunion material. However, the Court emphasized that the mere execution of such a contract provision (known as a "hot cargo" clause because of its prevalence in Teamster Union contracts), or its voluntary observance by the employer, was not unlawful under § 8(b)(4)(A). Section 8(e) was designed to plug this gap in the legislation by making the "hot cargo" clause itself unlawful. The *Sand Door* decision was believed by Congress not only to create the possibility of damage actions against employers for breaches of "hot cargo" clauses, but also to create a situation in which such clauses might be employed to exert subtle pressures upon employers to engage in "voluntary" boycotts.

It therefore would appear that Congress intended, by enacting Section 8(e), to supplement and not supplant the secondary boycott provisions of the Act which are now designated as Section 8(b)(4)(B). Moreover, it seems unlikely that Section 8(e), in utilizing the words "contract or agreement," was intended to encompass those situations where an employer, in the absence of a prior agreement, acquieces in union pressure to cease doing business with a person with whom the union has a dispute, or voluntarily acquiesces in a simple request that it cease doing business with another person.[31] In the former situation, the secondary boycott provisions of the Act, in Section 8(b)(4)(i) and (ii)(B) were designed to provide the appropriate Board relief and in the latter situation, the Supreme Court in *N.L.R.B.* v. *Servette, Inc.*, 377 U.S. 76 (1964), made it clear that a union can lawfully appeal

[30] As I have concluded here that the Union did not make a demand for an illegal closed-shop agreement, I do not rely on this assertion for finding the 8(b)(3) violation.

[31] See, e.g., *Local Freight Drivers Local No. 208, IBT (De Anza Delivery Systems, Inc.)*, 224 NLRB 1116, 1124 (1976); *Dairy Employees' Union, Local 754, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Glenora Farms Dairy, Inc.)*, 210 NLRB 483, 490 (1974).

to secondary employers to exercise their managerial discretion not to do business with a primary person, so long as such request is not accompanied by threats or coercion. Therefore, it seems to me that the words "contract or agreement" used in Section 8(e) contemplates the entering into of an agreement between a union and an employer, on a continuing basis, whereby the employer agrees to cease doing business with other persons with whom the Union may have future disputes.

In the instant case, there is no evidence that the Union tendered a contract to the GCA or its employer-members which would require them to cease doing business with firms not having contracts with or employ members of the union or any affiliated unions. Nor is it contended that the existing collective-bargaining agreement contains provisions prohibited by Section 8(e). It also is not contended that the Union has attempted to enforce any clause or reenter into any provision in the current contract, pursuant to which it sought to compel an employer to cease doing business with another person.

At best, the evidence here establishes that the only statements or conduct during the 10(b) period were:

1. The conduct of Business Agent Joe Matarazzo at the R. T. Sewer construction site in March, in sending away two trucks from a New Jersey supplier because a driver objected to Matarazzo's questioning of his union status.

2. The statement by John Cody on June 2 that the working teamsters foremen were irritated by the fact that nonunion drivers were driving trucks making deliveries to construction sites.

3. The statement by Working Teamsters Foreman Fornabia to O'Hare on June 2 that "deliveries within 282's jurisdiction must have a signed contract with the Teamsters."

4. The statement on June 4 by Matarazzo to O'Hare that, if he did not want the Slattery job shut down, he better send one of Slattery's trailers to pick up a delivery from a supplier with whom the Union had a current dispute.

5. The incident in July when a working teamsters foreman allegedly demanded a day's pay for a union member because a New Jersey supplier had sent a truckdriver who was not a member of Respondent. However, in this latter instance, King conceded that the Union immediately disavowed the claim.

In relation to the above incidents, it is noted that the only occasion where a threat was alleged to have been made to a GCA employer was the statement by Matarazzo to O'Hare on June 4. Also, in my opinion, the only occasion where a demand for an agreement can even be remotely inferred was in the fleeting conversations between Fornabia and O'Hare on June 2. As to this conversation it must be noted, however, that a working teamsters foreman is the lowest agent in the Union's heirarchy and is primarily a truckdriver.

It is my opinion that the evidence herein is insufficient to establish that Respondent sought to enter into a contract or agreement as defined by Section 8(e). When John Cody, on June 2, expressed the "irritability" of his members over deliveries being made by nonunion drivers, he did not at that time, or at any time thereafter, convert that sentiment into a demand for an agreement. At no time did the Union make a tender of a written agreement or proposal which, by its terms, sought to accomplish an 8(e) objective. In July, when King called the Union to complain of a claim for a day's pay made by a working teamster foreman, Business Agent Jaswaldi told him that the working teamsters foreman was mistaken and that the claim was invalid. In short, it is concluded that the evidence presented to establish that an 8(e) agreement was sought rests on too slender a thread. Accordingly, as it is concluded that the evidence is insufficient to establish that the Union sought to enter into an 8(e) agreement, there can be no basis for the alleged 8(b)(4)(ii)(A) allegation.[32]

CONCLUSIONS OF LAW

1. The General Contractors Association of New York, Inc., is a multiemployer association whose employer-members are employers and persons engaged in commerce within the meaning of Section 2(1), (2), (6), and (7) of the Act.

2. Respondent is a labor organization within the meaning of Section 2(5) of the Act.

3. By picketing employer-members of the GCA on May 21, 22, and 23, 1980, with an object of forcing or requiring them to recognize and bargain with Respondent as the collective-bargaining representative of certain employees which Respondent proposed to be hired, at a time when Respondent was not currently certified or recognized as such representative, and when no petition had been filed under Section 9(c) of the Act, Respondent engaged in and is engaging in unfair labor practices within the meaning of Section 8(b)(7)(C) of the Act.

4. By engaging in a strike and picketing in furtherance of its demands that the employer-members of the GCA alter or modify the existing collective-bargaining agreement to include a new class of employees not included or contemplated for inclusion in the existing collective-bargaining agreement, Respondent failed and refused to bargain in good faith and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(b)(3) of the Act.

5. Except to the extent heretofore found, Respondent has not engaged in any other unfair labor practices.

6. The unfair labor practices found, as described above in paragraphs 3 through 4, occurring in connection with the operations of the GCA and its employer-members described herein, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing the free flow of commerce.

7. The appropriate collective-bargaining unit herein includes all truckdrivers and working teamsters foremen employed by the employer-members of the General Contractors Association of New York, Inc., excluding all other employees, guards, and supervisors as defined in the Act.

[Recommended Order omitted from publication.]

[32] In reaching this conclusion, I express no opinion as to whether the Union, by the conduct of Matarazzo on June 4, violated the secondary boycott provisions of the Act as the complaint does not allege an 8(b)(4)(B) violation.